

**Adam Primus Varghese bin Abdullah v Wee Loke Choon & Ors
and another appeal**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NOS N-01(NCVC)(A)-85-03 OF 2017 AND N-02(NCVC)(A)-465-03
OF 2017

B

TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH
YUSOF JJCA

15 AUGUST 2018

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*Civil Procedure — Order — Setting aside — High Court granted order for sale
of land — Order for sale set aside by Court of Appeal — Court of Appeal ordered
second order for sale of land and second auction — High Court failed to comply
with orders of Court of Appeal — Whether amounted to illegality and warranting
an ex debito justitiae setting aside of order*

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*Land Law — Sale of land — Validity — Property acquired at public auction
— Order for sale set aside by Court of Appeal — Court of Appeal ordered second
order for sale of land and second auction — Whether sale of land valid
— Whether certificate of sale issued null and void — Whether purchaser at
auction acquired indefeasible title — National Land Code s 340*

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There were two appeals that arose for consideration, namely Appeal
No N-02(NCVC)(A)-465-03 of 2017 ('Appeal No 465'), which was brought
by Popular Acres Sdn Bhd ('Popular Acres') and Appeal
No N-01(NCVC)(A)-85-03 of 2017 ('Appeal No 85'), which was brought by
the liquidator of Popular Acres, namely Adam Primus Varghese bin Abdullah
(the liquidator). These two appeals related to the sale by public auction of a
piece of land held under Geran 61156, Lot 2490, Mukim Rasah, Daerah
Seremban, Negeri Sembilan (the land). Popular Acres was the previous
registered owner of the land. It created a third party charge in favour of
Southern Bank on 23 January 2006. The assets of the said bank subsequently
devolved through other entities so as to vest in the second respondent, the
chargee, South East Asia Special Asset Management Bhd ('SEASM'). On
29 February 2012, SEASM was granted an order for sale by the High Court in
Kuala Lumpur (the first High Court order). Popular Acres filed an application
to set aside the order but this application was dismissed. Wee Loke Choon, the
first respondent (Wee) was the successful bidder in a public auction pursuant
to the first High Court order (first public auction). Meanwhile, the Court of
Appeal allowed Popular Acres' appeal against the decision of the High Court
making the order for sale (the first Court of Appeal order). Pursuant to the first
Court of Appeal order, SEASM's application for leave to sell the land was

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- A re-heard by the High Court in Kuala Lumpur but was dismissed. SEASM appealed and the Court of Appeal allowed SEASM's appeal, allowing in effect the application for an order for sale ('the second Court of Appeal order'). SEASM filed an application seeking an order that the sale of the land to Wee vide the first public auction be set aside but it was dismissed by the High Court
- B on 19 March 2014. This order was made despite the second Court of Appeal order allowing the second order for sale. However, a second public auction was never held. Instead SEASM procured a certificate for sale in favour of Wee together with the documents of title. The land was then registered in Wee's name. Pursuant to this, Popular Acres applied to the High Court seeking to set
- C aside the first public auction, on the grounds inter alia that the certificate of sale obtained by Wee was wrongfully obtained given the two orders of the Court of Appeal. The High Court dismissed the application and hence vide these appeals both appellants, ie Popular Acres and the liquidator, challenge the validity of the sale of the land to Wee by SEASM. The issues for consideration
- D were: (a) whether the sale of the land vide the first public auction was valid given that the first order for sale granted by the High Court was subsequently set aside by the Court of Appeal; (b) whether the High Court order of 19 March 2014 dismissing SEASM's application to set aside the public auction of 1 November 2012 had the effect of approving and validating a sale of the
- E subject land to Wee; and (c) whether Popular Acres was caught by *res judicata* from bringing this application.

Held, allowing the appeal in Appeal No 465 and setting aside the decision of the High Court; and allowing the appeal in Appeal No 85:

- F (1) The net result of the failure to comply with the first order of the Court of Appeal setting aside the first order for sale was that the first public auction at which Wee put in a bid for the land was void because once the first
- G order for sale was held to have been set aside, there was no legal basis on which the public auction could be held. The acceptance of Wee's bid was rendered ineffective, null and void, by virtue of the second order of the Court of Appeal, separately and in addition to the first order of the Court of Appeal. This in turn meant that there was no effective acceptance of Wee's bid, and it followed that there could be no effective sale of the land
- H to Wee (see paras 45–46).
- I (2) The decision of the High Court was inherently flawed as it was in direct opposition to and sought to contravene two orders of a higher court which were handed down prior to its decision. The learned judge was plainly wrong in concluding that the sale of the land vide the first public auction was valid. It followed that the certificate of sale issued by the registrar pursuant to the order of the High Court of 19 March 2014 was similarly null and void and the title obtained by Wee was flawed and thus defeasible. Title to the said land ought to revert to Popular Acres as the registered owner subject to the charge in favour of SEASM. Wee was

entitled to the refund of his monies and such other recourse as may be available in law (see paras 52–53 & 56–57).

- (3) There was a clear and flagrant flouting of, or failure to comply with the express orders of a higher court, rendering the orders of the High Court null and void. This amounted to an illegality. It was clear that the order of the High Court dated 19 March 2014 did not have the effect of validating the order for sale or the sale to Wee of the subject land (see paras 62 & 64).

- (4) The principle of *res judicata* did not apply in the instant appeal in light of the illegality of the High Court order of 19 March 2014 which expressly contravened or failed to adhere to the two Court of Appeal orders. It was also of significance to note that Popular Acres was not seeking to re-litigate the matter giving rise to the 19 March 2014 order but sought declarations to enforce the two orders of the Court of Appeal. Further, Popular Acres was never a party to the said application and therefore could not had appealed against the order (see paras 67–69).

[Bahasa Malaysia summary]

Terdapat dua rayuan yang timbul untuk pertimbangan, iaitu Rayuan No N-02(NCVC)(A)-65–03 Tahun 2017 ('Rayuan No 465'), yang dibawa oleh Popular Acres Sdn Bhd ('Popular Acres') dan Rayuan No N-01(NCVC)(A)-85–03 Tahun 2017 ('Rayuan No 85'), yang dibawa oleh pelikuidasi Popular Acres, iaitu Adam Primus Varghese bin Abdullah ('pelikuidasi'). Kedua-dua rayuan ini berkaitan dengan jualan melalui lelongan awam bagi sebidang tanah yang dipegang di bawah Geran 61156, Lot 2490, Mukim Rasah, Daerah Seremban, Negeri Sembilan ('tanah tersebut'). Popular Acres adalah pemilik berdaftar tanah tersebut yang terdahulu. Ia membentuk satu gadaian pihak ketiga bagi Southern Bank pada 23 Januari 2006. Aset bank tersebut kemudiannya disalurkan melalui entiti lain untuk meletakkan hak kepada responden kedua, pemegang gadaian, South East Asia Special Asset Management Bhd ('SEASM'). Pada 29 Februari 2012, SEASM telah diberi perintah jualan oleh Mahkamah Tinggi di Kuala Lumpur ('perintah Mahkamah Tinggi pertama'). Popular Acres memfailkan permohonan untuk mengetepikan perintah tetapi permohonan ini ditolak. Wee Loke Choon, responden pertama ('Wee') adalah pembida yang berjaya dalam lelongan awam menurut perintah Mahkamah Tinggi pertama ('lelongan awam pertama'). Sementara itu, Mahkamah Rayuan membenarkan rayuan Popular Acres terhadap keputusan Mahkamah Tinggi membuat perintah jualan ('perintah Mahkamah Rayuan pertama'). Selaras dengan perintah Mahkamah Rayuan pertama, permohonan SEASM untuk kebenaran bagi menjual tanah tersebut telah didengar semula oleh Mahkamah Tinggi di Kuala Lumpur tetapi ditolak. SEASM merayu dan Mahkamah Rayuan membenarkan rayuan SEASM, membenarkan permohonan bagi perintah jualan ('perintah Mahkamah Rayuan kedua'). SEASM memfailkan permohonan mendapatkan perintah

- A jualan tanah tersebut kepada Wee melalui lelongan awam pertama untuk
dikepikan tetapi ia telah ditolak oleh Mahkamah Tinggi pada 19 Mac 2014.
Perintah ini dibuat walaupun perintah Mahkamah Rayuan kedua
membenarkan perintah jualan kedua. Walau bagaimanapun, lelongan awam
kedua tidak pernah diadakan. Sebaliknya SEASM mendapatkan sijil jualan
B memihak kepada Wee bersama-sama dengan dokumen hakmilik. Tanah itu
kemudian didaftarkan di atas nama Wee. Selaras dengan ini, Popular Acres
memohon kepada Mahkamah Tinggi untuk mengetepikan lelong awam yang
pertama, atas alasan bahawa sijil jualan yang diperoleh Wee diperoleh secara
salah memandangkan dua perintah Mahkamah Rayuan. Mahkamah Tinggi
C menolak permohonan tersebut dan dengan itu melalui rayuan kedua-dua
perayu, iaitu Popular Acres dan pelikuidasi, mencabar kesahihan penjualan
tanah itu kepada Wee oleh SEASM. Isu-isu untuk pertimbangan adalah:
D Tinggi kemudiannya diketepikan oleh Mahkamah Rayuan; (b) sama ada
perintah Mahkamah Tinggi pada 19 Mac 2014 yang menolak permohonan
SEASM untuk mengetepikan lelongan awam pada 1 November 2012
mempunyai kesan meluluskan dan mengesahkan jualan tanah kepada Wee;
E dan (c) sama ada Popular Acres ditangkap oleh res judicata daripada membawa
permohonan ini.

Diputuskan, membenarkan rayuan dalam Rayuan No 465 dan mengetepikan
keputusan Mahkamah Tinggi; dan membenarkan rayuan dalam Rayuan
No 85:

- F (1) Keputusan sebenar kegagalan untuk mematuhi perintah pertama
Mahkamah Rayuan mengetepikan perintah jualan pertama adalah
bahawa lelongan awam pertama di mana Wee memasukkan bidaan
untuk tanah tersebut adalah tidak sah kerana apabila perintah jualan
G pertama telah diketepikan, tiada asas undang-undang di mana lelongan
awam boleh diadakan. Penerimaan bidaan Wee menjadi tidak berkesan,
batal dan tidak sah, berdasarkan perintah Mahkamah Rayuan kedua,
secara berasingan dan sebagai tambahan kepada perintah Mahkamah
Rayuan pertama. Ini bermakna tiada penerimaan berkesan terhadap
H bidaan Wee, dan diikuti bahawa tiada jualan tanah yang berkesan kepada
Wee (lihat perenggan 45–46).
- I (2) Keputusan Mahkamah Tinggi sememangnya salah kerana ia berada
dalam tentangan terus kepada dan cuba untuk melanggar dua perintah
mahkamah yang lebih tinggi yang telah diberikan sebelum
keputusannya. Hakim yang bijaksana secara jelas salah dalam
menyimpulkan bahawa jualan tanah melalui lelongan awam pertama
adalah sah. Ia diikuti bahawa sijil jualan yang dikeluarkan oleh pendaftar
menurut perintah Mahkamah Tinggi pada 19 Mac 2014 adalah juga
batal dan tidak sah dan hakmilik yang diperoleh oleh Wee adalah salah

dan dengan itu boleh disangkal. Hakmilik ke atas tanah tersebut patut dikembalikan kepada Popular Acres sebagai pemilik berdaftar tertakluk kepada gadaian yang memihak kepada SEASM. Wee berhak untuk pembayaran balik wangnya dan apa-apa cara lain yang boleh didapati dalam undang-undang (lihat perenggan 52–53 & 56–57).

- (3) Terdapat pelanggaran yang jelas dan nyata, atau kegagalan untuk mematuhi perintah nyata mahkamah yang lebih tinggi, membuatkan perintah Mahkamah Tinggi batal dan tidak sah. Ini adalah menyalahi undang-undang. Adalah jelas bahawa perintah Mahkamah Tinggi bertarikh 19 Mac 2014 tidak mempunyai kesan mengesahkan perintah jualan atau penjualan kepada Wee terhadap tanah tersebut (lihat perenggan 62 & 64).

- (4) Prinsip *res judicata* tidak terpakai dalam rayuan ini memandangkan kesalahan undang-undang perintah Mahkamah Tinggi pada 19 Mac 2014 yang secara nyata melanggar atau gagal mematuhi perintah Mahkamah Rayuan. Ia juga penting untuk diambil perhatian bahawa Popular Acres tidak memohon untuk melitigasi semula perkara yang menimbulkan perintah 19 Mac 2014 tetapi memohon pengisytiharan untuk menguatkuasakan dua perintah Mahkamah Rayuan. Tambahan lagi, Popular Acres tidak pernah menjadi pihak kepada permohonan tersebut dan oleh itu tidak boleh merayu terhadap perintah tersebut (lihat perenggan 67–69).]

Notes

For cases on setting aside, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6723–6724.

For cases on validity, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5560–5561.

Cases referred to

Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (folld)

Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422, SC (refd)

Legislation referred to

National Land Code ss 256, 257(d), 259(3), 340, 340(2)(b)

Appeal from: Originating Summons Nos 24NCVC-147–06 of 2016 and 24NCVC-202–8 of 2016 (High Court, Seremban)

HY Chong (Muhammad Iqram bin Zulkupri and Michael Koh with him) (Azman Davidson & Co) in Civil Appeal Nos N-01(NCVC)(A)-85–03 of 2017 and N-02(NCVC)(A)-465–03 of 2017 for the appellant.

- A *Manian Raju (Pung Jenn Jian with him) (Krishna Dallumah, Manian & Indran) in Civil Appeal Nos N-01(NCVC)(A)-85-03 of 2017 and N-02(NCVC)(A)-465-03 of 2017 for the first respondent.*
Ahmad Zamri Khuziarni (TK Chong with him) (Che Mokhtar & Ling) in Civil Appeal Nos N-01(NCVC)(A)-85-03 of 2017 and N-01(NCVC)(A)-465-03 of 2017 for the second respondent.
B *Rozaimah bt Adnan (Muhammad Fairuz with her) (Deputy Public Prosecutor, Attorney General's Chambers) in Civil Appeal No N-01(NCVC)(A)-85-03 of 2017 for the third respondent.*

C **Nallini Pathmanathan JCA:**

INTRODUCTION

- D [1] There are two appeals that arise for consideration, namely Appeal No N-02(NCVC)(A)-465-03 of 2017 ('Appeal No 465'), which is brought by Popular Acres Sdn Bhd (in liquidation) ('Popular Acres') and Appeal
E No N-01(NCVC)(A)-85-03 of 2017 ('Appeal No 85'), which is brought by the liquidator of Popular Acres, namely Adam Primus Varghese bin Abdullah ('the liquidator'). These two appeals relate to the sale by public auction of a piece of land held under Geran 61156, Lot 2490, Mukim Rasah, Daerah Seremban, Negeri Sembilan ('the land').

- F [2] As the outcome of Appeal No 465 will effectively determine the outcome of Appeal No 85, we shall in this judgment refer to and deal with the issues in Appeal No 465. This will bind and determine Appeal No 85.

- G [3] Popular Acres was the previous registered owner of the land. It created a third party charge in favour of Southern Bank on 23 January 2006. The assets of the said bank subsequently devolved through other entities so as to vest in the second respondent here, the chargee, South East Asia Special Asset Management Bhd ('SEASM').

- H [4] Wee Loke Choon, the first respondent here ('Wee') was the successful bidder in a public auction held at the Kuala Lumpur High Court on 1 November 2012 ('first public auction').

- I [5] Although Wee was the successful bidder at the first public auction as of 1 November 2012, the Court of Appeal on 22 February 2013 allowed an appeal against the order of the High Court sanctioning the sale and held that the order for sale (being the basis for the first public auction) be set aside ('the first Court of Appeal order setting aside the first order for sale'). At this point in time Wee's offer to purchase the land had been accepted by SEASM.

[6] However further to other orders of the Court of Appeal and High Court (which will be set out in detail below), a second public auction was never held, as intended and effectively directed by the Court of Appeal in both its first and subsequent order. There was effectively no compliance with the orders of the Court of Appeal.

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[7] Instead SEASM, through its solicitors, procured a certificate for sale in favour of Wee together with the documents of title.

[8] Vide these appeals both appellants, namely Popular Acres and the liquidator, challenge the validity of the sale of the land to Wee by SEASM. And this challenge is premised primarily on the fact that the first order for sale was set aside vide the first order of the Court of Appeal. In order to comprehend the challenge it is necessary to consider the salient facts surrounding these appeals.

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SALIENT FACTUAL MATRIX

[9] Popular Acres was the registered owner of the land. On 23 January 2006, it charged the land to Southern Bank Berhad as security for a term loan facility of RM1m as well as an overdraft facility of RM1m ('facilities') granted to two individual borrowers.

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[10] Subsequently all of Southern Bank's rights and liabilities, including the charge created by Popular Acres, were vested in Bumiputra-Commerce Bank vide order of court dated 6 September 2006. By order of court dated 15 January 2010 all rights and liabilities arising from the charge were then vested in SEASM.

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THE FIRST ORDER FOR SALE

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[11] On 23 December 2011, SEASM filed an originating summons applying for an order for sale of the land. On 29 February 2012 an order for sale was granted by the High Court in Kuala Lumpur. On 25 July 2012 Popular Acres filed an application to set aside the order dated 29 February 2012 but this application was dismissed.

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[12] SEASM therefore proceeded to procure an order to sell the land by way of public auction on 4 October 2012.

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[13] On 19 October 2012, Popular Acres filed an appeal against the High Court decision to the Court of Appeal.

- A** [14] On 1 November 2012 the first auction was carried out pursuant to the first High Court order for sale of the land. Wee put in a bid at the first auction and his bid was accepted.
- B** [15] On 22 February 2013, the Court of Appeal allowed Popular Acres' appeal against the decision of the High Court making the order for sale ('the first Court of Appeal order setting aside the first order for sale'). As a consequence, the order for sale dated 29 February 2012 was set aside. It was ordered that the application by the chargee, SEASM, to sell the land be re-heard in the Kuala Lumpur High Court.
- C**
- [16] As Wee's bid to purchase the land had been accepted by this point in time, he proceeded to enter a private caveat on the land on 3 April 2013.
- D** [17] Pursuant to the first Court of Appeal order setting aside the order for sale, SEASM's application for leave to sell the land was re-heard by the High Court in Kuala Lumpur on 15 May 2013, but was dismissed ('the second High Court decision dismissing the application for an order for sale').
- E** [18] SEASM therefore appealed against the second High Court decision.
- [19] On 8 January 2014 the Court of Appeal allowed SEASM's appeal, allowing in effect the application for an order for sale ('the second Court of Appeal order allowing the second order for sale').
- F**
- [20] In the interim, prior to this, in June and July 2013 two matters of relevance transpired:
- G** (a) a petition to wind up Popular Acres was presented by Alliance Bank Malaysia Bhd;
- (b) SEASM filed an application on 3 July 2013 seeking an order that the sale of the land to Wee vide the first public auction be set aside and that the full purchase price paid by him in the sum of RM820,000 be set aside;
- H** (c) Wee applied to intervene and oppose SEASM's application in October 2013;
- (d) the Kuala Lumpur High Court then once again dismissed SEASM's application to set aside the purported sale of the land to Wee on 19 March 2014. This order was made despite the second Court of Appeal order reversing the order of the High Court refusing to grant a order for sale, in other words, allowing the second order for sale; and
- I** (e) SEASM did not appeal against this order.

[21] Popular Acres was wound up on 11 March 2014.

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[22] Subsequent to this on 28 October 2014, SEASM's solicitors wrote to the Kuala Lumpur High Court advising that Wee had paid the purchase price in full. SEASM sought the issuance of a certificate for sale in favour of Wee. Wee procured the certificate for sale by court within a month, on 24 November 2014. The land was then registered in Wee's name subsequently on 3 March 2017.

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THE ORIGINATING SUMMONS COMPRISING THE SUBJECT MATTER OF THIS APPEAL AND THE DECISION OF THE HIGH COURT

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[23] Pursuant to this, Popular Acres applied to the High Court at Seremban seeking to set aside the first auction, on the grounds, *inter alia*, that the certificate of sale obtained by Wee was wrongfully obtained given the two orders of the Court of Appeal. The first order of the Court of Appeal setting aside the first order for sale comprised the basis for such application. As the first order for sale comprised the basis for any valid sale, and such order had been set aside, it was contended that the sale to Wee could not be validated.

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[24] On 28 February 2017 the High Court at Seremban dismissed the application by Popular Acres. *It is this originating summons that comprises the subject matter of the appeal before us.* The High Court held, *inter alia* that Popular Acres was precluded by the principles of *res judicata* from obtaining the relief sought because it was relying on the same principles as had been relied on by SEASM in its application to set aside the first auction.

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[25] Secondly, the High Court held that Popular Acres' application is an abuse of process as it should have appealed against the decision of the order of the High Court dismissing the application to set aside the sale to Wee. (This application was made by SEASM and not Popular Acres). Further, the High Court held that it had no concurrent jurisdiction to set aside the order by the High Court at Kuala Lumpur dated 19 March 2014.

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THE ARGUMENTS PUT FORWARD BY LEARNED COUNSEL FOR THE APPELLANT AND THE RESPONDENT

[26] Popular Acres submitted, *inter alia*, that the learned judge erred in concluding that the earlier High Court decision dismissing the application by SEASM to set aside the first sale had the effect of validating the first sale in favour of Wee. This was because the High Court only dismissed SEASM's application but did not expressly validate it.

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- A [27] The learned judge failed to consider the effect of the first Court of Appeal order dated 22 February 2013 which stated that: ‘Perintah Jualan bertarikh 29-2-2012 serta saman minta arahan bertarikh 8-5-2012 diketepikan’. Accordingly, the first sale was void.
- B [28] Further, the order of the High Court dated 19 March 2014 dismissing SEASM’s application to set aside the sale could not override the express orders of the Court of Appeal, both the first order rendering the first order for sale void, as well as the second order of the Court of Appeal holding that the second order for sale was valid. This meant in effect that a second public auction ought to have been held.
- C
- D [29] Apart from being contrary to the principle of stare decisis it would amount to a direct contradiction of two orders of a higher court by a lower court, which is wholly untenable. It effectively renders the decision of the lower court void as the lower court has made an order in defiance of the order of the higher court.
- E [30] Finally, the principle of res judicata was simply not applicable because Popular Acres was not seeking to re-litigate the 19 March 2014 order. Instead Popular Acres (and necessarily the liquidator in the other appeal, Appeal No 85) were seeking a declaration and enforcement of the first and second Court of Appeal orders.
- F [31] In support of the contention that the High Court hearing this originating summons had the jurisdiction to set aside the earlier High Court decision, notwithstanding its concurrent jurisdiction, reliance was placed on *Badiaddin Bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393.
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- H [32] Popular Acres also submitted on the issue of the validity of the sale to Wee by reason of the foregoing. In this context it was contended that the issuance of the certificate was ultra vires for failure to comply with the strict requirements of the National Land Code (‘the NLC’).
- I [33] Section 257(d) of the NLC had not been adhered to and this in itself was fatal to the order for sale (see *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422). This is because, once the first order for sale of 29 November 2012 was set aside by the Court of Appeal, the Registrar had no power or authority under the National Land Code to issue a certificate of sale pursuant to the first auction, which was void. Any such power exercised by the Registrar under s 259(3) of the NLC had to be pursuant to a valid order for sale under s 256 of the NLC.

OUR DECISION AND ANALYSIS

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[34] The appeal before us relates to the order of the High Court at Seremban dated 28 February 2017 where the latter refused the application by Popular Acres for a declaration that the sale of its land by SEASM to Wee pursuant to the first public auction on 1 November 2012 was void. The basis for such application by Popular Acres is the first order of the Court of Appeal setting aside the first order for sale.

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[35] Moreover the second order of the Court of Appeal had ordered that a second auction be held, thereby further supporting and emphasising the validity of the first order of the Court of Appeal.

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[36] As stated above the grounds relied on by the High Court in making such an order were three-fold:

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- (a) Popular Acres was caught by the principle of res judicata;
- (b) the application was an abuse of process as Popular Acres ought to have appealed against the earlier decision of the High Court dated 19 March 2014 refusing to set aside the first order for sale; and
- (c) the High Court had no concurrent jurisdiction to set aside the order by the High Court at Kuala Lumpur dated 19 March 2014.

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[37] In order to ascertain whether the grounds set forth by the High Court in Appeal No 465 are correct, we concur with learned counsel for the appellant that the primary legal issues that fall for consideration are:

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- (a) whether the sale of the land vide the first public auction is valid given that the first order for sale granted by the High Court was subsequently set aside by the Court of Appeal?
- (b) whether the High Court order of 19 March 2014 dismissing SEASM's application to set aside the public auction of 1 November 2012 had the effect of approving and validating a sale of the subject land to Wee? and
- (c) whether Popular Acres is caught by res judicata from bringing this application?

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ISSUE (A): WHETHER THE SALE OF THE LAND VIDE THE FIRST PUBLIC AUCTION IS VALID GIVEN THAT THE FIRST ORDER FOR SALE GRANTED BY THE HIGH COURT WAS SUBSEQUENTLY SET ASIDE BY THE COURT OF APPEAL?

I

[38] It is not in dispute that Wee purchased the land pursuant to the first public auction dated 1 November 2012, which in turn was held and concluded

A pursuant to the first order for sale dated 29 February 2012. This ‘sale’ by public auction to Wee was sought to be validated vide a certificate of sale sought by SEASM from the High Court. Such certificate of sale was granted by the High Court on 24 November 2014 together with the documents of title on 24 November 2014.

B
[39] However this entire sequence of events leading up to the sale to Wee and the current status of Wee as enjoying indefeasible title to the land under s 340 of the NLC ignores the express and mandatory effect of the first order of the Court of Appeal dated 22 February 2013 setting aside the first order for sale granted by the High Court.

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[40] The significance of the first order of the Court of Appeal of 22 February 2013 setting aside the first order for sale appears to have been completely ignored by SEASM and Wee as well as the High Court in defiance of the fundamental principle that an order of a higher court does and must take precedence over that of a lower court.

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[41] The very structure and basis of the system of adjudication in our courts requires complete and absolute adherence to this principle. The traditional hierarchical model of the judiciary in Malaysia envisions the High Court as comprising the base of the judicial pyramid of the superior judiciary, the Court of Appeal the middle, and the Federal Court the apex of the pyramid. As such, the High Court simply implements the orders of the Court of Appeal, as does the latter in relation to orders of the Federal Court. It is the strict implementation of this judicial structure that lends certainty, rigor and order to the system of law as formulated.

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[42] In as much as Federal Court orders and judgments are viewed as the reigning law of the land, in the context of the instant case, the orders of the Court of Appeal have the same ‘reigning’ effect vis a vis the High Court. The complete impunity with which the High Court simply ignored two orders of the Court of Appeal vide its orders of 19 March 2014 and 28 February 2017 invite serious consideration.

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[43] Failure of the High Court to comply with orders of the Court of Appeal or Federal Court, if not corrected, would give rise to chaos and amount to a failure to comply with the rule of law. The order of a higher court is not to be ignored or by-passed with impunity (it is only where such an order of the higher court has been held to be illegal by a subsequent order, that it need not be complied with).

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[44] In the instant case the order of this court appears to have been disobeyed with impunity and could give rise to contempt if so pursued. It should be

pointed out that this is not simply a case of stare decisis, where there was a failure to comply with a binding precedent issued by a higher court. It goes further than that because the High Court here chose not to comply with orders which are directly relevant and binding on it, to the issues at hand, thereby giving rise to the present difficulties encountered by the parties.

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[45] The net result of the failure to comply with the first order of the Court of Appeal setting aside the first order for sale is that the first public auction at which Wee put in a bid for the land is void. It is void because once the first order for sale was held to have been set aside, there was no legal basis on which the public auction could be held. There was no valid or in fact any order for sale on which the public auction could be premised. So any tender or bid or acceptance of the same was of no legal effect.

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[46] The effect of the first order of the Court of Appeal was further emphasised, reiterated and underscored by the second order of the Court of Appeal dated 8 January 2014, reversing the order of the High Court refusing to order a public auction. The express words of the second order of the Court of Appeal stipulated and directed that a second public auction be held. In other words, the acceptance of Wee's bid was rendered ineffective, null and void, by virtue of this second order of the Court of Appeal, separately and in addition to the first order of the Court of Appeal. This in turn meant that there was no effective acceptance of Wee's bid, and it follows that there could be no effective sale of the land to Wee.

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[47] The decision of the High Court at Kuala Lumpur dated 19 March 2014 dismissing SEASM's application to set aside the order for sale in favour of Wee, stands out as yet another decision ignoring and flying in the face of, both the first and second orders of the Court of Appeal.

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[48] What then, it will be asked, of this order of the High Court dated 19 March 2014, which ignored the effect of both the first order of the Court of Appeal dated 29 February 2012 and the second order of the Court of Appeal dated 8 January 2014?

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[49] It remains on record and, as it has not been appealed against, remains (it is contended) binding. It is argued by the respondents that as SEASM failed to appeal against that decision, it stands and remains as a binding order of court, comprising the basis, inter alia, for the contention of res judicata. This however is a flawed argument as it fails to consider the flagrant disobedience of the High Court to the two orders of the Court of Appeal, invalidating the first auction and thereby any purported sale made pursuant to such auction. In point of fact, the decision of the High Court is in direct contradistinction to that of the Court of Appeal.

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A [50] Apart from the High Court's refusal to give effect to the orders of the Court of Appeal, we also note that much time and expense was expended by virtue of SEASM's unnecessary application to set aside the first sale of the land to Wee. This application was unnecessary in light of the first order of the Court of Appeal invalidating the first auction. The Court of Appeal had on B 22 February 2013 set aside the first order for sale and ordered a re-hearing. Since the matter was re-heard by the High Court and went up on appeal to the Court of Appeal, the first order for sale dated 29 February 2012 was no longer valid, but in fact null and void. Therefore, there was no need for SEASM to attempt to have it set aside by way of the notice of application filed on 3 July C 2013 in the High Court as the Court of Appeal had already done so on 22 February 2013.

D [51] In any event, the first order for sale has become redundant by reason of the second order for sale granted by the Court of Appeal on 8 January 2014.

E [52] The decision of the High Court in the instant appeal is therefore a decision that is appropriate to be set aside on the grounds envisaged in the case of *Badiaddin*. The decision of the High Court is inherently flawed as it is in direct opposition to and seeks to contravene two orders of a higher court which were handed down prior to its decision. It is prima facie flawed or incorrect, warranting its setting aside as being a nullity or fatal irregularity. This will be discussed further below.

F [53] The net result in relation to the instant appeal is that the learned judge was plainly wrong in concluding that the sale of the land vide the first public auction was valid given that:

- G (a) the first order for sale granted by the High Court was subsequently set aside by the first order of the Court of Appeal dated 29 February 2012; and
(b) the Court of Appeal vide its second order dated 8 January 2014 expressly ordered that a second or new auction be carried out.

H [54] In these circumstances, as explained above, Wee's bid for the land and the acceptance of the same was rendered null and void by the first order of the Court of Appeal. This is because the first auction in itself became null and void as the order for sale on which it was predicated, was set aside.

I [55] It follows that if there was no valid auction and no valid bid nor acceptance, there could be no valid sale of the land to Wee. This is further supported and emphasised by the second order of the court of Appeal which held that a second auction was to be held.

[56] If there was no valid sale, it follows that the certificate of sale issued by the Registrar pursuant to the order of the High Court of 19 March 2014 is similarly null and void as that order is fatally irregular in itself. Accordingly it would follow that the title obtained by Wee is similarly flawed and thus defeasible because it was acquired vide a void instrument.

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[57] Under the provisions of s 340(2)(b) of the NLC, any title acquired as a consequence of a void instrument is rendered defeasible and is available to be set aside as of right by the rightful party asserting title to the same. In the instant case, the registered owner of the land is Popular Acres, while SEASM has a charge in its favour. As the purported sale to Wee is invalid which consequently renders the title acquired defeasible under s 340(2)(b) of the NLC, it follows that title to the said land ought to revert to Popular Acres as the registered owner subject to the charge in favour of SEASM. Wee is entitled to the refund of his monies and such other recourse as may be available in law.

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ISSUE (B): WHETHER THE HIGH COURT ORDER OF 19 MARCH 2014 DISMISSING SEASM'S APPLICATION TO SET ASIDE THE PUBLIC AUCTION OF 1 NOVEMBER 2012 HAD THE EFFECT OF APPROVING AND VALIDATING A SALE OF THE SUBJECT LAND TO WEE?

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[58] For the reasons we have set out above, the High Court order of 19 March 2014 did not and could not have the effect of approving and validating the sale of the land to Wee. This is because there was never any valid sale of the land to Wee as the first order for sale was null and void. All acts subsequent to the same in furtherance of such purported sale were equally null and void.

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[59] It is appropriate at this juncture to consider the Federal Court decision in *Badiaddin*. The facts are well known. There the appellants were the registered co-owners of a piece of Malay reserve land. A third party charge was created in favour of the respondent finance company as security for a loan given by the finance company to another person. The finance company obtained an order for the sale of the land under the NLC but the order was later set aside by the court on the grounds that the charge was illegal as the charge was not 'Malay' for the purposes of the Malay Reservation Enactment.

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[60] Two years later the finance company again applied before the same court and obtained an order for the sale of the land by public auction. The appellants in *Badiaddin* applied to a separate court of concurrent jurisdiction to declare the second order of sale void and have it set aside on the ground that such order contravened the Enactment. They succeeded in setting aside the second order in the High Court but failed in the Court of Appeal which held,

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A inter alia, that the High Court had no jurisdiction to review and set aside the second order of sale irrespective of the illegality of the order.

B [61] It is evident that in the instant appeal the stance taken by SEASM bears resemblance to decision of the Court of Appeal in *Badiaddin* in opposing the appeal by Popular Acres. The Federal Court in *Badiaddin* however rejected the Court of Appeal's grounds and reversed its decision. In so doing, Mohd Azmi FCJ stated, inter alia, as follows:

C ... It is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. *But one special exception to this rule ... is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of Isaacs v Robertson [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'. (Emphasis added.)*

F [62] In the instant appeal, while there is no breach of a statute, there is a clear and flagrant flouting of, or failure to comply with the express orders of a higher court, rendering the orders of the High Court null and void. This amounts to an illegality, which is prima facie evident on a perusal of the record of appeal. The High Court in the instant appeal ought to have appreciated this before simply stipulating that it had no jurisdiction to set aside an order of a court of concurrent jurisdiction. The learned judge, with great respect, failed to consider whether the factual matrix in the instant case gave rise to any illegality warranting an *ex debito justitiae* setting aside of the order of the High Court at Kuala Lumpur dated 19 March 2014. This amounts to an error warranting appellate intervention.

H [63] Appellate intervention is necessary to reverse the order of the High Court at Seremban refusing to set aside the decision of the High Court at Kuala Lumpur dated 19 March 2014 rejecting SEASM's application to set aside the sale of the land to Wee. The reasons, as we have stipulated at length above, are that the said order of 19 March 2014 is fatally flawed for not having given effect to and in fact opposing the express provisions of the two orders of the Court of Appeal expressly setting aside the first order for sale and ordering a second auction. This amounted to an illegality which was sufficient basis to set aside the said order under the narrow principle enunciated in *Badiaddin*.

[64] In these circumstances it is clear that the order of the High Court dated 19 March 2014 did not have the effect of validating the order for sale or the sale to Wee of the subject land. A

ISSUE (C): WHETHER POPULAR ACRES IS CAUGHT BY RES JUDICATA FROM BRINGING THIS APPLICATION? B

[65] This issue is also answered by the Federal Court decision in *Badiaddin*.

[66] The judgment of Gopal Sri Ram JCA is highly relevant in this respect. There His Lordship (as he then was) held that a court of unlimited jurisdiction, even in the absence of express enabling provisions, has inherent power to set aside its orders made in breach of written law. This is what he said at p 397: C

... As a general rule, orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. However, it is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court upon the illegality being clearly shown to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear in light of the principles established by high authority that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. *And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance.* (Emphasis added.) D E F

[67] It is clear from the foregoing that the principle of res judicata does not apply in the instant appeal in light of the illegality of the High Court order of 19 March 2014 which expressly contravenes or fails to adhere to the two Court of Appeal orders dated 29 February 2012 and 8 January 2014. Therefore the instant appeal is a case that falls within the narrow confines of *Badiaddin* whereby res judicata does not operate to prevent the setting aside of the flawed order of the High Court of 19 March 2014. G H

[68] It is also of significance to note that as submitted by Popular Acres, it is not seeking to re-litigate the matter giving rise to the 19 March 2014 order. By this application Popular Acres is seeking declarations to *enforce* the two orders of the Court of Appeal. I

[69] Further, Popular Acres was never a party to the said application and therefore could not have appealed against the order. That role fell upon

A SEASM. It was SEASM that failed or neglected to appeal against the said order, resulting in the current predicament. Further, SEASM further prolonged the proceedings by ignoring the first order of the Court of Appeal which set aside the sale of the land and filing a new setting aside application in the High Court on 3 July 2013.

B CONCLUSION ON APPEAL NO 465

C [70] In these circumstances it follows that the learned judge was plainly wrong in arriving at her decision in Appeal No 465 and accordingly the appeal is allowed. We therefore set aside the decision of the High Court and allow the application by Popular Acres in terms of paras 1(a), (b), (c), (d), and (e), and paras 2 (a), (b) and (d), and prayer 4 of the originating summons. These reliefs are set out below for ease of reference:

D (1) For a declaration:

E (a) that all proceedings for the sale of the land held under Title No 61156, Lot 2490, Mukim Rasah, Daerah Seremban, Negeri Sembilan ('land') carried out pursuant to the order of the High Court dated 29 February 2012 granted in the Originating Summons No 24NCVC-3264-12 of 2011 ('order dated 29 February 2012') are void;

F (b) that the sale of the land carried out by the second defendant (SEASM) pursuant to the order dated 29 February 2012 is void;

(c) that the purchase of the land by the first defendant (Wee) pursuant to the sale carried out by the second defendant pursuant to the order dated 29 February 2012 is void;

G (d) that the certificate of sale of the land dated 24 November 2014 issued to the first defendant pursuant to the sale carried out by the second defendant pursuant to the order dated 29 February 2012 is void; and

H (e) that the first defendant has acquired no registrable interest in the land pursuant to the sale carried out by the second defendant pursuant to the order dated 29 February 2012;

(2) Consequent to the above, for an order:

I (a) that the first defendant within fourteen (14) days of this order, deliver the original document of title of the land to the second defendant;

(b) that the private caveat, bearing presentation number of 2882/2013 dated 3 April 2013, entered at the instance of the first defendant on the land be removed forthwith;

- (c) (not allowed); and A
- (d) that the second defendant forthwith carry out the order of the Court of Appeal order dated 8 January 2014 given in the Civil Appeal No W-02(NCVC)(A)-1597-07 of 2013 and do all things consequential in accordance with the provisions of the National Land Code; B
- (3) (not allowed);
- (4) that the costs of and occasioned to this application be paid by the second defendant, whether jointly and/or severally, to the plaintiff. C

In addition, we order:

- (5) that the first defendant is entitled to a refund of the full purchase price paid by him to SEASM together with interest at 5%pa from the date of the first public auction on 1 November 2012 until date of full settlement. D

[71] In respect of costs, we award costs of RM15,000 here and below against the second respondent, SEASM, to be paid to Popular Acres, subject to allocatur. However, we make no order of costs against the first and third respondents. E

THE IMPLICATION ON THE APPEAL OF THE LIQUIDATOR IN APPEAL NO 85

[72] In Appeal No 85 which was heard together with Appeal No 465, the liquidator appealed against Wee's successful application to remove the private caveat entered on the land by the liquidator. Wee maintains that the liquidator has no registrable interest in the land in light of his indefeasible title and therefore has no locus standi to remove the caveat. F
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[73] As we have concluded that the sale of the land by SEASM to Wee vide the first auction is void, the appropriate remedy to be granted against the liquidator is to allow the caveat to remain as the liquidator has established a registrable interest in the land. Accordingly we allowed the liquidator's appeal in Appeal No 85. H

[74] Costs are awarded against the second respondent, SEASM, in the sum of RM6,000 here and below to be paid to the liquidator of Popular Acres, subject to allocatur. However, we make no order of costs against the first respondent. The deposit is refunded. I

Appeal in Appeal No 465 allowed and decision of High Court set aside; and appeal in Appeal No 85 allowed.

Reported by Ahmad Ismail Illman Mohd Razali